


SO ORDERED.

SIGNED this 2nd day of June, 2020.




LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:)	
)	Chapter 13
)	
Christopher B. Lipscomb, Sr.,)	Case No. 18-80784
)	
Debtor.)	
)	
)	
)	

ORDER

**SETTING HEARING AND SUPPLEMENTAL BRIEFING DEADLINES ON DEBTOR’S RULE 3002.1(b)
MOTION TO DETERMINE WHETHER MORTGAGE PAYMENT CHANGE IS REQUIRED**

THIS MATTER came before the Court on the Debtor’s objection to the notice of mortgage payment change filed by creditor Pingora Loan Servicing, LLC (the “Creditor”). Based upon the record in this bankruptcy case and for the reasons discussed below, the Court will direct the affected parties to file briefs and set an additional hearing on the Debtor’s objection, which the Court will interpret as a Rule 3002.1(b) motion to determine whether a mortgage payment change is required.

The Debtor filed this chapter 13 bankruptcy case on October 24, 2018. Among the assets listed in Debtor’s Schedule A/B are interests in two pieces of real property. One of these properties is the Debtor’s residence at 1830 Fillmore Drive, Creedmoor, North Carolina (the “Property”),¹ which the Debtor holds in tenancy by the entirety with his wife. The Property is subject to a mortgage note and recorded deed of trust held by the Creditor in the amount of

¹ The Debtor also listed an interest in 124 Magnolia Drive, Roxboro, North Carolina, which the Debtor jointly owned with an ex-spouse (Docket No. 1). On August 28, 2019, the Court entered an order authorizing the Debtor to convey his interest in 124 Magnolia Drive to his ex-spouse (Docket No. 54).

\$175,704.53, as reflected in the Creditor's proof of claim (Claim # 9-1). The mortgage servicer on the Debtor's loan is Flagstar Bank, FSB.

On December 12, 2018, the Debtor filed his chapter 13 plan in which he proposed to make monthly plan payments of \$3,327.00 for 60 months (Docket No. 16). As part of that monthly plan payment, \$1,283.00 was to be directed to the Creditor for the Debtor's ongoing mortgage installment payment. These ongoing mortgage payments were to be paid through the plan and disbursed by the chapter 13 trustee (the "Trustee"). The Debtor's chapter 13 plan also provided for repayment of \$5,166.00 in estimated arrears owed to the Creditor. The Creditor did not file an objection to the Debtor's plan and filed a proof of claim on January 2, 2019, which showed the Debtor's mortgage payment of \$1,283.55 had decreased to \$1,035.25 effective November 1, 2018 (Claim # 9-1). The \$1,035.25 monthly payment was comprised of \$860.37 in principal and interest and \$174.88 in escrow.

As there were no filed objections to the Debtor's proposed plan, the Court entered an order confirming the plan on February 11, 2019 (Docket No. 20). The Trustee's records confirm the Trustee began disbursing monthly mortgage payments of \$1,035.25 to the Creditor on February 28, 2019. The Trustee continued to disburse payments of \$1,035.25 to the Creditor, in accordance with the Creditor's proof of claim, through February of 2020.

On January 20, 2020, the Creditor filed a notice of mortgage payment change (the "Notice") proposing an increased monthly mortgage payment of \$1,606.25, effective March 1, 2020. The \$571.00 per month increase was due entirely to an increase in the escrow payment. The attachments to the Notice reflect that the Creditor conducted an annual escrow analysis on December 18, 2019, uncovering what the Creditor characterized as an escrow shortage of \$3,869.30.

The Debtor filed an objection to the Notice on February 4, 2020, alleging the proposed payment change "is overstated" (Docket No. 60). The Debtor contended that the Creditor had received its regular mortgage installment payments in an amount sufficient to fund the ongoing escrow account. On February 12, 2020, the Creditor filed a response, averring that its records and attachments to the Notice were correct and requesting a hearing on the Debtor's objection.

The Court held hearings on the Debtor's objection on March 12 and April 22, 2020, both of which were continued to allow the parties to gather more information and seek a resolution to

the objection. On May 7, 2020, the Court held the continued hearing telephonically,² at which Koury Hicks appeared on behalf of the Debtor and Neil Jonas appeared on behalf of the Creditor. Benjamin Lovell appeared on behalf of the Trustee.

The parties' representations at the hearing reflected no resolution to the objection was forthcoming. The parties did, however, provide more information on the cause of the increased monthly mortgage payment described in the Notice, which stemmed from the Creditor's error in calculating the ongoing monthly escrow payment. When the Creditor conducted the 2018 escrow analysis, which it attached to its proof of claim, the Creditor's calculation of \$174.88 for the ongoing monthly escrow payment erroneously failed to account for the Debtor's annual property taxes. The Creditor's inaccurate escrow payment calculation resulted in the escrow shortage of \$3,869.30 after the Creditor disbursed the Debtor's 2018 and 2019 property tax payments.

The Creditor's Notice represents a two-pronged approach to correcting the problems arising from its 2018 escrow miscalculation. The Creditor first proposes to increase the ongoing escrow payment to \$423.44 per month, which is the amount that predates the inadvertent 2018 adjustment.³ To cure the existing \$3,869.30 escrow shortage, the Notice offers the Debtor the option of paying the entire sum in one payment or paying \$322.44 per month "over [the Debtor's] next 12 monthly payments beginning with [his] payment due March 1, 2020." The Debtor does not challenge the Creditor's intention to increase the ongoing escrow payment to \$423.44 per month, but he does argue the Creditor's attempt to recoup the escrow shortage of \$3,869.30 is a violation of Rule 3002.1 and should be disallowed. In response, the Creditor contends it is not seeking repayment of the 2018 taxes, thus providing the Debtor a "free year" from that tax obligation, and that its proposal to recoup the 2019 tax advance, which the Debtor knew he was obligated to pay, is in full compliance with Rule 3002.1.

The information relating to the basis of the proposed mortgage payment increase is certainly useful, but in both their papers and at the hearing, the Debtor and the Creditor did not sufficiently identify or engage with the underlying question in this dispute — whether the proposed change "is required to maintain payments in accordance with § 1322(b)(5) of the

² Due to the COVID-19 outbreak, the Bankruptcy Court for the Middle District of North Carolina issued a standing order that all bankruptcy hearings are to be conducted telephonically. *See* Amended Standing Order re Court Operations Under the Exigent Circumstances Created by COVID-19 (effective Mar. 26, 2020).

³ At the hearing, the Debtor's attorney stated he was aware that the monthly escrow payment was approximately \$423 at the time of the bankruptcy petition, and that he provided for this amount in the chapter 13 plan (Docket No. 16).

Code.” Fed. R. Bankr. P. 3002.1(b)(2). Rule 3002.1 of the Federal Rules of Bankruptcy Procedure, which applies in chapter 13 cases to claims secured by an interest in the debtor’s principal residence when the plan provides that either the trustee or the debtor will make contractual installation payments, “is meant to ensure a debtor is fully informed about amounts owed and is not surprised after leaving his chapter 13 bankruptcy.” *In re Meyer*, 596 B.R. 172, 178 (Bankr. M.D. Pa. 2019).⁴ Pursuant to that stated intention, Rule 3002.1(b)(1) requires a mortgage creditor to file “a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-amount adjustment, no later than 21 days before a payment in the new amount is due.” In 2018, Rule 3002.1 was amended “to clarify that parties in interest have the right to contest a payment change notice.” 9 COLLIER ON BANKRUPTCY ¶ 3002.1.02(6) (16th ed. 2020). A party in interest opposing a proposed mortgage payment change must therefore utilize the following procedure:

(2) *Objection.* A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed by the day before the new amount is due, the change goes into effect, unless the court orders otherwise.

Fed. R. Bankr. P. 3002.1(b)(2). If a motion to determine is filed, “the creditor has the burden of proof to establish that the payment change is required under the underlying mortgage agreement or nonbankruptcy law even though the motion is filed by the debtor or other party in interest.” 9 COLLIER ON BANKRUPTCY ¶ 3002.1.02(6) (16th ed. 2020).

The Debtor’s objection was framed as an objection to claim, pursuant to § 502(b) and Federal Bankruptcy Rule 3007, which generally governs objections to claims (Docket No. 60).

⁴ The Advisory Committee on Bankruptcy Rules explained the purpose behind requiring creditors to provide *timely* notice of any potential changes to a debtor’s mortgage payment:

In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any prepetition arrearage, see Rule 3001(c)(2), and the amount of the postpetition payment obligations. If the latter amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if appropriate, and to adjust postpetition mortgage payments to cover any undisputed claimed adjustment.

Advisory Committee Note to Fed. R. Bankr. P. 3002.1 (2011). Considering the longstanding defects within the mortgage servicing industry, many of which prompted the creation of Rule 3002.1, it is also incumbent upon debtors and trustees to scrupulously examine the calculations of mortgage servicers. In his treatise, Judge Lundin remarked that “[d]ebtors, their attorneys and the Chapter 13 Trustee have to carefully analyze every Notice of Payment Changes filed under Bankruptcy Rule 3002.1(b) and not assume that the accounting is accurate.” Keith M. Lundin, LUNDIN ON CHAPTER 13, § 131.3, at ¶ 65, LundinOnChapter13.com (last visited June 2, 2020). As this case demonstrates, debtors, their attorneys, and trustees should apply this degree of meticulousity not only to Rule 3002.1(b) notices, but also to mortgage creditors’ proofs of claims and initial payment calculations.

At the hearing, the Debtor more accurately framed his objection within the context of Rule 3002.1, but inaccurately asserted that the Creditor was required to pursue its recovery of the 2019 tax advance via a 3002.1(c) Notice of Postpetition Mortgage Fees, Expenses and Charges, using Official Form 410S2, rather than through a Notice of Mortgage Payment Change on Official Form 410S1. This contention is unsupported by either the language of Rule 3002.1(b)(1), which calls for the filing of a Notice of Mortgage Payment Change in the event of “any change in the payment amount, including any change that results from an interest-rate *or* escrow-account adjustment,” or line 8 of Official Form 410S2, which requires a Notice of Postpetition Mortgage Fees, Expenses and Charges only for “[t]ax advances” that are “non-escrow.”⁵ See also *In re Meyer*, 596 B.R. 172, 183 (Bankr. M.D. Pa. 2019) (finding creditor could not have violated Rule 3002.1(c) if all the escrow advances complained of were “escrow items” under the mortgage documents); *Trevino v. HSBC Mortg. Servs. (In re Trevino)*, 535 B.R. 110, 123–24 (Bankr. S.D. Tex. 2015) (where mortgage did not include escrow for real estate taxes, creditor filed 3002.1(c) notice to recover its non-escrow advance for 2010 property taxes).

Similarly, the Creditor’s written response to the Debtor’s objection did not mention Rule 3002.1 and instead focused upon the accuracy of the amounts shown in the Notice (Docket No. 65). At the hearing, the Creditor again relied in large part on the lack of any objection to the figures stated in the Notice. The Creditor also accurately stated that a Notice of Mortgage Payment Change on Official Form 410S1 was the proper vehicle to recoup the escrow advances at issue. Lastly, the Creditor argued that no violation of Rule 3002.1(b)(1) occurred here because the Notice was filed more than 21 days before the new payment amount was due on March 1, 2020.

While the Court interprets the Debtor’s objection to the Notice as a Rule 3002.1(b) motion to determine whether the proposed mortgage payment change is required to maintain payments under § 1322(b)(5), neither the Debtor nor the Creditor has adequately addressed that question. The Debtor’s focus on whether the Creditor used the appropriate official form was not well taken and did not grapple with the question at issue in Rule 3002.1(b)(2). While the Debtor spoke to the purpose of Rule 3002.1 in preventing surprise mortgage payment changes, he did not connect this argument to whether the proposed payment change in the Notice is required to maintain payments in accordance with § 1322(b)(5). For its part, the Creditor is correct that its

⁵ Part 1 of Official Form 410S2 further instructs creditors to “not include any escrow account disbursements.”

Notice did not violate the 21-day requirement within Rule 3002.1(b)(1), but the Creditor failed to adequately address the alternate avenue by which the Debtor could challenge the Notice under Rule 3002.1(b)(2).

As the procedural mechanism described in Rule 3002.1(b)(2) was only recently implemented and has not been widely employed in this district, the Court finds it appropriate to schedule a further hearing with the Debtor's objection to be treated as a motion to determine under Rule 3002.1(b)(2)⁶ and to request briefing on the narrow question of whether the proposed payment in the Notice is required to maintain payments in accordance with § 1322(b)(5), particularly whether the payment change "is required under the underlying mortgage agreement or nonbankruptcy law[.]" 9 COLLIER ON BANKRUPTCY ¶ 3002.1.02(6) (16th ed. 2020). Specifically, the parties should address whether the \$3,869.30 escrow shortage must be recouped within 12 months.

Because of the potential impact to the Debtor's chapter 13 case, THE COURT FURTHER FINDS that time is of the essence and will direct the parties to file their briefs on an accelerated timeframe.

Accordingly, IT IS HEREBY ORDERED, with respect to the Debtor's objection to the Creditor's Notice of Mortgage Payment Change, which the Court interprets as the Debtor's motion to determine under Rule 3002.1(b)(2), that

1. the Debtor and Creditor shall file supplemental briefs addressing whether the payment change is required to maintain payments in accordance with § 1322(b)(5) **by Wednesday June 10, 2020**,
2. if the Trustee or the United States Bankruptcy Administrator wishes to respond to the Creditor or the Debtor's supplemental briefs, their response is due **by Friday June 12, 2020**, and
3. the Debtor, Creditor, and any interested parties shall appear for a telephonic hearing on this matter **at 10:00 a.m. on June 16, 2020**, unless the Court enters an Order on the matter before that date.

END OF DOCUMENT

⁶ In the future, counsel should utilize the appropriate event code on CM/ECF when filing motions to determine validity of mortgage payment change. Using the menu bar at the top of CM/ECF, the event code can be located at: *Bankruptcy* → *Motions/Applications* → *Determine Validity of Payment Change*.

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18-80784 C-13

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